19 No. (1)

In the
Supreme Court of the United States

BERTRAM HAHN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the U.S. Court of Appeals for the Fourth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Do doctors' nonplussed reactions to a negative response to the question of whether the patient received additional treatments put a reasonable person on notice under the Federal Tort Claims Act that the original treatment was not properly administered?

PARTIES TO THE PROCEEDINGS

Bertram Hamn

United States of America

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Petitioner, Lieutenant Colonel, Retired, Bertram Hahn, respectfully prays that a writ of certiorari issue to review the order and judgment of The United States Court of Appeals for the Fourth Circuit entered in his case on November 5, 2008.

OPINIONS BELOW

The unpublished opinion of The United States Court of Appeals for the Fourth Circuit, *Hahn v. The United States*, No. 07-1343 is located at (A-1). The order of The United States District Court for the District of Greenbelt (8:06-cv-03179-PJM) is located at (A-11).

JURISDICTION

The judgment of The United States Court of Appeals for The Fourth Circuit was entered on November 5, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (2008).

STATUTORY PROVISION INVOLVED

The statute of limitations portion of 28 U.S.C. § 2401 (b) (2008), The Federal Tort Claims Act has been interpreted: "When the facts of a case become so grave as to alert a reasonable person that there may have been negligence in a patient's treatment, the statute of limitations begins to run against the claimant's cause of action." *Gould v. The United States*, 905 F.2d 738, 746 (4th Cir. 1990) (citing *West v United States*, 592 F.2d 487, 492 (8th Cir. 1979), *quoting Hulver v. United States*, 562 F.2d 1132, 1134 (8th Cir. 1977), *cert. denied*, 435 U.S. 951, 55 L. Ed. 2d 800, 98 S. Ct. 1576 (1978). This Court has held a claim under The Federal Tort Claim's Act "accrues within the meaning of § 2401(b) when the plaintiff knows both the existence and the cause of his injury,

and not at a later time when he also knows that the acts inflicting the injury may constitute medical malpractice." *United States v. Kubrick,* 444 U.S. 111, 112 (1979).

STATEMENT OF THE CASE

This case presents the question of whether nonplussed responses by the medical community when they asked Petitioner if he received additional treatment were sufficient to place Petitioner on notice that his original medical treatment may have caused his residual weakness, where residual weakness is a common result of Guillain-Barre Syndrome.

On or about May 17, 2000, Petitioner presented to Bethesda National Naval Medical Center ("BNNMC") with severe weakness in his limbs. The health care providers at BNNMC quickly diagnosed him with Guillain-Barre Syndrome ("GBS").

At approximately 17:00 on May 17, 2000, he was transferred to Walter Reed Army Medical Center (" WRAMC") when a bed became available. At WRAMC, the original diagnosis of GBS was confirmed, and treatment with intravenous immunoglobulin ("IVIg") was started on May 18, 2000.

At this point, the paralysis was spreading and severely affecting all of his limbs and he was still in a state of decline. The health care providers became concerned that the paralysis may affect his breathing.

Unfortunately, the intensive care unit at WRAMC was full and he was transferred back to BNNMC where he was admitted to the intensive care unit. The order for IVIg from WRAMC specifically ordered

treatment with IVIg for five (5) days to effectively treat the GBS.

Petitioner was unaware of the order or its implementation as he had no medical training, was in poor health, and was being treated with an IV and by other means. Given these facts, he assumed he was being appropriately treated.

Petitioner stayed in the intensive care unit until May 21, 2000, at which point he was transferred to the medical ward at BNNMC awaiting return to WRAMC.

On May 23, 2000, he was transferred to the rehabilitation ward at WRAMC and in June 2001, Petitioner was discharged from treatment for GBS from WRAMC.

Since the discharge, Petitioner consulted various health care providers outside the military health care system in the hopes of improving to a greater degree than he was informed he could by the military medical community.

The various health care providers asked typical questions about his medical history to include, when he started back on the IVIg after the initial administration, or if he had ever been given a plasma exchange subsequent to treatment with IVIg. Petitioner responded that he had not received any additional treatment with IVIg or a plasma exchange. The doctors either did not respond or answered with a nonverbal gesture.

In August 2003, Petitioner met with Dr. Jay Meythaler at the University of Alabama School of Medicine in Birmingham, Alabama regarding enrollment in the Clinical Trial Drug Study for GBS. During the course of his meeting with Dr. Meythaler

and while enrolling in the Trial Drug Study, a medical history regarding the previous treatment for GBS at BNNMC and WRAMC was given to Dr. Meythaler.

Petitioner provided the medical records to him and advised Dr. Meythaler that the GBS was quickly diagnosed, that he was administered IVIg, and that there was no follow up or additional treatment.

Three days after the August 2003 meeting with Dr. Meythaler, Petitioner contacted Dr. Meythaler and learned that he did not originally receive the standard treatment as ordered in the records.

This was unknown to him until this time. It was at this time Petitioner learned the standard treatment protocol to treat GBS required five (5) days regimen of IVIg. Further investigation revealed that he had been administered IVIg for only twenty-six (26) hours or less.

Learning of this fact, on or about September 22, 2003, Petitioner began writing letters to WRAMC, Patient Affairs Office and in November 2003 and January 2004, Petitioner received a letter back from Colonel Thomas Fitzpatrick, Deputy Commander for Clinical Services, stating that a review of his medical records and the treatments he received had revealed in WRAMC's view, Petitioner was treated appropriately.

Therefore, since this information conflicted with that of Dr. Meythaler, on or about February 26, 2004, Petitioner filed a claim with the Department of Navy Claims Services and the Department of Army Claims Services because he had received treatment at both institutions.

This claim was denied in February 2006 and suit was filed in The United States District Court for The District of Maryland in April 2006.

On March 23 2007, The United States District Court for The District of Maryland dismissed Petitioner's cause of action.

On November 5, 2008, The United States Court of Appeals for The Fourth Circuit affirmed the findings as adjudged.

REASONS FOR GRANTING THE WRIT

This Court should grant this petition because the lower court's ruling in this case conflicts with other the federal circuits. One, unlike the second circuit where a "claim does not accrue when a person has a mere hunch, hint, suspicion, or rumor of a claim." *Valdez v. The United States*, 518 F.3d 173, 178 (2nd Cir 2008) citing *Kronisch v. The United States,* 150 F.3d 112,121 (2d Cir 1998), the Fourth Circuit requires Petitioner to guess there may be a claim on the original treatment, based on the doctor's non-response, when Petitioner informed the doctors', he did not receive any additional treatment. Two, contrary to *Ramiriz v. The United States*, 496 F. 3d 41, 47 (1st Cir. 2007) citing *Gonzalez v. The United States*, 284 F.3d 281, 288 (1st Cir 2002), in order to toll the statute of limitations pursuant to the discovery rule "the factual basis for the cause of action must have been 'inherently unknowable' at the time of injury; "'Inherently unknowable' means that the factual basis is "incapable of detection by the wronged party through the exercise of reasonable diligence. *Id.* (internal quotation marks omitted)", the lower court's decision would have Petitioner go above and beyond explaining the treatment he was informed he received

and require him to not only interpret his medical records but completely understand the medicine in order to ascertain the facts behind it for treatment and therefore when he received a non-response have the knowledge to insist a review of his medical records be completed, and three, the Fourth Circuit required Petitioner to pursue a malpractice investigation immediately upon discharge due to the fact he was in a small portion of the population who does not fully recover from GBS, even though in June 2001 there was no way for Petitioner to know what went wrong was iatrogenic. *Contra Drazen v. The United States*, 762 F.2d 56, 59 (7th Cir. 1985).

I. The United States Court of Appeals for The Fourth Circuit's decision conflicts with other federal circuits.

Under the Federal Tort Claims Act § 2401(b) a claim will accrue when a person has facts that would enable a reasonable person to discover the alleged negligence even though the government's negligence may have rendered the person incapable of appreciating the significance of the facts of the situation. *Barren v. United States*, 839 F.2d 987, 990 (3d Cir 1988), *cert. denied*, 488 U.S. 827 (1998); *See also United States v Kubrick*, 444 U.S. 111 (1979); *Nemmers v. United States*, 795 F.2d 628 (7th Cir. 1986), *aff'd*, 870 F.2d 426 (7th Cir. 1989).

On approximately May 15, 2000, Petitioner had a rapid onset of symptoms that left him in dire need of medical attention due to the resulting paralysis that appeared to be setting in. On May 17, 2000, Petitioner was diagnosed with GBS. GBS is defined as:

> An acute, immune-mediated disorder or peripheral nerves, spinal roots, and cranial nerves, commonly presenting as a rapidly progressive, areflexive, relatively symmetric ascending weakness of the limb, truncal, respiratory, pharyngeal, and facial musculature, with variable sensory and autonomic dysfunction; typically reaches its nadir within 2-3 weeks, followed initially by a plateau period of similar duration, and then subsequently by gradual but complete recovery in the majority of cases. Guillain-Barre syndrome is often preceded by a respiratory or gastrointestinal infection and is associated with albuminocytologic dissociation of the cerebral spinal fluid. Although classically considered pathologically to be an acute, inflammatory demyelinating polyradiculoneuropathy (q.v.), pure axon degeneration forms recently have been recognized.

Stedman's Medical Dictionary 27th ed. (2003), available at http://www.stedmans.com/section.cfm/45

The onset of GBS with treatment and therapy by WRAMC caused Petitioner to stay under their care for approximately thirteen months. Before being discharged and up through January 2004, the military medical community informed Petitioner that a small portion of patients with GBS never fully recover.

Upon release from military medical care in June 2001, Petitioner began consulting doctors in order to pursue any and all possible opportunities to attempt to improve his condition. While giving an oral

medical history to prospective new doctors, most of the doctors asked Petitioner if he received any additional treatment besides the IVIg. Petitioner responded "no." The doctors then gave a non-response such as a "shrug of the shoulders." This led Petitioner to conclude that in those doctors' opinions nothing about his treatment fell below an acceptable level of care and he was in a small portion of patients with GBS who never fully recover.

In August 2003, Petitioner decided to enroll in an experimental study being conducted by Dr. Meythaler. After Petitioner recounted his treatment, Dr. Meythaler requested to review Petitioner's records. Dr. Meythaler informed Petitioner that he did not receive the standard five day treatment for GBS, he received twenty-six hours or less and it resulted in the condition he now found himself. Petitioner inquired about this new information to WRAMC and when he did not received a satisfactory answer he subsequently filed his administrative claim. *United States v. Kubrick*, 444 U.S. 111 (1979)(A claim accrues within the meaning of § 2401(b) when the plaintiff knows both the existence and the cause of his injury.)

The present case is similar to *United States v. McDonald*, 843 F.2d 247 (6th Cir. 1988.) In *McDonald,* the petitioner under went spine surgery in 1980 and was informed by the surgeon and several other doctors that it would take petitioner three to five years to recover. *Id.* at 248. In 1984 petitioner found out the weakness was actually caused by the surgery and he subsequently filed his complaint. *Id.* In their application of *Kubrick*, the Sixth Circuit stated: "when a physician misinforms the patient that complications are not unusual

occurrences and will improve, the statute of limitations is not activated." *Id.* citing by e.g. *Rosales v. United States*, 824 F.2d 799, 804 (9th Cir. 1987). The Court in *McDonald* held "that the statute of limitations should be tolled during the period of the McDonalds' 'blameless ignorance.' The assurances given to McDonald, if any, present a controverted issue of material fact which would defeat a motion for summary judgment." *Id.* at 249.

In the present case, Petitioner was informed that a certain percentage of people never fully recover from GBS. It was not until August 2003 that Petitioner found the residual weakness may have been caused by the doctors failing to administer the full original treatment. Therefore similar to *McDonald* the statute of limitations for Petitioner would have been activated when he learned he did not receive the full original treatment, not when he was informed he was in a small percentage of people who never fully recover and not when he responded in the negative to the question of did he receive additional treatment.

In *Drazen v. The United States*, 762 F.2d 56, 59 (7th Cir. 1985), the appellate court reversed the district court's decision that the claim began at the time of the death of her husband and held the statute of limitations "begins to run either when the government cause is known or when a reasonably diligent person (in the tort claimant's position) reacting to any suspicious circumstances of which he might have been aware would have discovered the government cause -- whichever comes first." *Id.* Judge Posner stated:

> The district court's approach, if widely adopted, would have the following rather ghoulish consequence: any time someone suffered pain or illness or death in a Veterans Administration hospital, he (or in the case of death his survivors) would request his hospital records to see whether diagnosis or treatment might have played a role in his distress—whether, that is, the harm might have been "iatrogenic"(doctor-caused). He could not wait till he had reason to think he had suffered an iatrogenic harm: the two years might have run. We do not think such behavior should be encouraged, or that anything in *Kubrick* requires us to encourage it. *Id.*

Moreover, the second circuit has explained, a "claim does not accrue when a person has a mere hunch, hint, suspicion, or rumor of a claim." *Valdez v. The United States,* 518 F.3d 173, 178 (2nd Cir 2008) citing *Kronisch v. United States*, 150 F.3d at 121.

Contrary to *Drazen*, in the instant case, the lower Court would have Petitioner initiate a medical malpractice investigation because he was in the small percentage of people who never recover from GBS. Additionally, when he was being diligent in attempting to improve his condition, contrary to *Valdez*, the lower court would have Petitioner guess that a non-response by the doctor, in response to his answer that he did not receive additional treatment must be because the original treatment was below standard and therefore the medical malpractice investigation must begin.

Additionally, the lower court's ruling is contrary to this Honorable Court's decision in *United States v. Kubrick*, 444 U.S. 111 (1979). In *Kubrick*, Mr. Kubrick was admitted to the Veterans Administration hospital, in Wilkes-Barree, Pennsylvania in April 1968, for treatment of an infection of the right femur. *Id.* at 113. When his surgery was complete "the infected area was treated with neomycin, an antibiotic, until the infection cleared." *Id.* About six weeks after Mr. Kubrick was discharged he began to notice ringing in his ears. *Id.* at 114. He consulted many ear specialists that resulted in a confirmation of the diagnosis of bilateral nerve deafness. *Id.*

Finally, "Dr. Sataloff, secured Kubrick's VA hospital records and in January 1969, informed Kubrick that it was highly possible that the hearing loss was the result of the neomycin treatment administered at the hospital." *Id.* This Honorable Court found that in January 1969, Mr. Kubrick was in "possession of all the facts about the cause of his injury." *Id.* at 123. Mr. Kubrick filed his administrative claim approximately four years after being in possession of all the facts. *Id.* at 115 n.4.

In the present case, the lower court found that Petitioner consulted medical professionals after discharge. Although it was not until Dr. Maythaler informed Petitioner it is possible the lack of a full original treatment caused his condition, the lower court held, unlike in *Kubrick*, Petitioner should have been more persistent with medical professionals who did not indicate treatment was unacceptable but essentially took his medical history, said nothing, and then asked about additional treatment and

continued to not indicate anything may be wrong with the original treatment received.

This case is distinguishable from *Gould v. United States Department of Health and Human Services*, 905 F.2d 738, 747 (4th Cir. 1990), *cert. denied*, 498 U.S. 1025 (1991), where the court held:

> [T]he plaintiffs were immediately aware of the failure to properly diagnose and treat and knew that Drs. O'Rourke and Nathanson were the decedent's attending physicians. With this information of the physicians' errors followed by the patient's death, a reasonable person would have been alerted at the time of the death that such death may have been the result of medical negligence.

In the case at bar, it is not possible for immediate awareness that is described in *Gould*. Petitioner is told that he is one of the percentages of people who never fully recover. He is in a much better state than the near paralysis he entered the hospital with thirteen months previous. Doctors consulted after release said nothing about the original treatment.

In *Valdez v. The United States of America*, 518 F.3d 173 (2nd Cir. 2008), the child was born on December 13, 2000, severely brain damaged due to aspiration of meconium known as Meconium Aspiration Syndrome (MAS). *Id.* at 175. Immediate intervention can sometimes help prevent MAS. *Id.* In determining the date that a reasonable person would know the cause of the injury in *Valdez*, the Court stated that the mother was aware she gave birth to a brain damaged child but that condition was not necessarily related to any medical treatment. *Id.* at 180. The court in *Valdez* did not

set a particular accrual date because the record was silent with respect to the circumstances that led the mother to seek legal counsel. *Id.* Although the Court did go on to state:

> If discovery were to indicate that, despite reasonable diligence, Elon's mother did not, in fact, learn about the cause of injury until June 3, 2001, the complaint would have been timely filed. Since we reject the "ghoulish" suggestion –to borrow Judge Posner's word— that due diligence demanded a reasonable person in the position of Elon's mother commence a malpractice investigation immediately upon Elon's birth or even her discharge from St. Luke's Hospital, such a claim would not have necessarily accrued on either of those dates, and the motion to dismiss should be denied on remand unless the record establishes some significant omission beyond Ms. Donely's failure to make a malpractice inquiry during the first eighty-five days, *i.e.*, approximately three months, after she brought her brain-damaged baby home.

Id. at 181

The lower court, in the present case is asking Petitioner to do what Judge Posner cautioned against.

> When Hahn responded in the negative, the doctors' consistent, nonplussed reactions should have put him on notice that his medical treatment might have been the cause of his residual weakness. A reasonable person exercising due diligence under the same

> circumstances would have provided the doctors with his medical records and asked the doctors whether some aspect of his treatment might have caused his incomplete recovery.

(A-8.)

Similar to the district court in *Valdez,* the lower court's incorrect finding has Petitioner guess that nonplussed reactions to the question of whether he received additional treatment could lead him to think his original treatment caused his condition even after the military medical community informed him that a small percentage of people never fully recover.

The facts of the present case are analogus to the appellate court's reasoning in *Valdez.* After being informed that he is one of a small percentage of people who never fully recover from GBS, Petitioner began using reasonable diligence to attempt to improve his situation. He consulted other medical professionals. These professionals asked him if he received additional treatments. Petitioner responded "no," and the professionals never inquired further. Next, through reasonable diligence Petitioner found an experimental study. He recounted his medical history and informed the new doctor he did not receive additional treatment. Nothing was said in response to this oral history but now enrolled in an experimental study specifically for GBS, Petitioner left his medical records for the doctor conducting the study to review. After this review Petitioner first learned about the possible cause of his injury. As such, he began his investigation into medical malpractice. In

accordance with statute and settled case law, Petitioner soon thereafter timely filed an administrative claim followed by a suit against The United States.

CONCLUSION

Contrary to settled precedent of this Honorable Court, the 1st, 2nd, 6th, and 7th Circuits, the Fourth Circuit found that when Petitioner answered the question no he did not receive additional treatment and he received nonplussed reactions to his negative response; Petitioner needed to have a hunch that not receiving additional treatment means the original treatment fell below the standard of care and therefore he should have started his medical malpractice investigation. Petitioner needed to have this hunch even though there was no way for Petitioner to know what went wrong was iatrogenic and the explanation for the results of the original treatment and the syndrome made the reason for his condition inherently unknowable. For the foregoing reasons, Petitioner respectfully requests that this Honorable Court grant his petition for a writ of certiorari.

Respectfully submitted,

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January 23, 2009

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 07-1343

BERTRAM HAHN,

Plaintiff - Appellant,

v.

UNITED STATES OF AMERICA,

Defendant - Appellee.

Appeal from the United States District Court for the District of Maryland, at Greenbelt. Peter J. Messitte, Senior District Judge. (8:06-cv-03179-PJM)

Argued: September 25, 2008

Entered: November 5, 2008

Before WILLIAMS, Chief Judge, GREGORY, Circuit Judge, and James C. CACHERIS, Senior United States District Judge for the Eastern District of Virginia, sitting by designation.

Affirmed by unpublished opinion. Judge Gregory wrote the opinion, in which Chief Judge Williams and Senior Judge Cacheris joined.

ARGUED: Clifford John Shoemaker, Vienna, Virginia, for Appellant. Alex Samuel Gordon, OFFICE OF THE UNITED STATES ATTORNEY, Baltimore, Maryland, for Appellee. ON BRIEF: Timothy Litka, Washington, D.C., for Appellant. Rod J. Rosenstein, United States Attorney, John W. Sippel, Jr., Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Baltimore, Maryland, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

GREGORY, Circuit Judge:

The Appellant, Bertram Hahn ("Hahn"), appeals the district court's decision to dismiss his Federal Tort Claims Act ("FTCA") lawsuit against the United States. Hahn had initially filed an administrative complaint with the Department of the Army Claims Services ("DACS") and the Department of the Navy Claims Services ("DNCS"), alleging that he had received negligent medical treatment. Hahn's claim was denied by DACS on the ground that Hahn had failed to file an administrative complaint within two years after the claim accrued, as required by 28 U.S.C. § 2401(b) (2000). Hahn subsequently filed the instant lawsuit. Upon motion by the United States, the district court dismissed Hahn's complaint for lack of subject matter jurisdiction, relying on the same ground as DACS.

Because Hahn should have known of the existence and likely cause of his injury more than two years before he filed his administrative complaint, we affirm the decision of the district court.

I.

On May 17, 2000, Hahn went to the emergency room at Bethesda National Naval Medical Center ("BNNMC") complaining of severe weakness in the limbs. Medical personnel at BNNMC diagnosed Hahn as having Guillain-Barré Syndrome ("GBS"), an acute auto-immune neurological disorder. The medical personnel at BNNMC ordered that Hahn receive intravenous immunoglobulin ("IVIg")

treatment for five days. Later that day, Hahn was transferred to Walter Reed Army Medical Center ("WRAMC"), where his diagnosis and course of treatment were confirmed. Medical personnel at WRAMC began IVIg treatment on May 18, 2000. That same day, Hahn was transferred back to BNNMC and admitted to an intensive care unit with orders to continue the five days of IVIg treatment. According to Hahn, medical personnel at BNNMC failed to follow these instructions and only administered IVIg treatment for one more day. At that time, Hahn was unaware that he was scheduled to receive five days of IVIg treatment. Hahn remained in the intensive care unit at BNNMC until May 21, 2000, when he was transferred to the medical ward at BNNMC. On May 23, 2000, Hahn was transferred to the rehabilitation ward at WRAMC, where he remained until his discharge in June 2001.

After Hahn was discharged from WRAMC, he continued to suffer from residual weakness. Hahn had been told that some GBS patients continue to have residual weakness after receiving treatment. Nevertheless, Hahn consulted with several other doctors regarding further rehabilitation because he was dissatisfied with his level of recovery. Hahn acknowledges that he began receiving consultations from these other doctors in June 2001. (Supp. J.A. 21.) According to Hahn, these doctors asked him whether he had been given any subsequent IVIg treatments or whether he had been given a plasma exchange following the initial IVIg treatment. Hahn answered these questions in the negative, after which the doctors either responded by saying "Oh?" or remained completely silent. (Supp. J.A. 90.)

In August 2003, Hahn met with Dr. Jay Meythaler regarding enrollment in a clinical drug trial for treatment of GBS. Although the initial meeting with Dr. Meythaler was similar in many respects to Hahn's prior consultations, this consultation differed crucially because Hahn provided Dr. Meythaler with his medical records as part of the assessment for the clinical drug trial. Three days after receiving these medical records, Dr. Meythaler advised Hahn that BNNMC medical personnel had failed to administer the full five days of IVIg treatment and that this failure may have caused his residual weakness.

On February 26, 2004, Hahn filed an administrative complaint with DACS and DNCS. Hahn's claim was denied by DACS on February 1, 2006. On April 19, 2006, Hahn filed this lawsuit against the United States under the FTCA, 28 U.S.C. §§ 2671-2680 (2000), in the United States District Court for the District of Columbia. Upon motion by the United States, the court transferred the case to the United States District Court for the District of Maryland. The United States then filed a motion to dismiss the complaint for lack of subject matter jurisdiction because Hahn had failed to bring his administrative complaint within two years after the claim accrued, as required by 28 U.S.C. § 2401(b). The district court granted the motion to dismiss. Hahn appeals.

II.

Hahn contends that the district court erred in granting the motion to dismiss for lack of subject matter jurisdiction because his claim did not accrue until August 2003, when Dr. Meythaler told Hahn

that his residual weakness may have been caused by his medical treatment. We review de novo the district court's grant of a motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1) of the Federal Rules of Civil Procedure. Richmond, Fredericksburg & Potomac R.R. Co. v. United States, 945 F.2d 765, 768-69 (4th Cir. 1991). When deciding a 12(b)(1) motion, "the district court is to regard the pleadings' allegations as mere evidence on the issue, and may consider evidence outside the pleadings without converting the proceeding to one for summary judgment." Id. at 768. The party asserting subject matter jurisdiction has the burden of proving that the court has jurisdiction over the case. Adams v. Bain, 697 F.2d 1213, 1219 (4th Cir. 1982). "Unlike the procedure in a 12(b)(6) motion where there is a presumption reserving the truth finding role to the ultimate factfinder, the court in a 12(b)(1) hearing weighs the evidence to determine its jurisdiction." Id.

As a sovereign, the United States is immune from suit unless it consents to being sued. United States v. Sherwood, 312 U.S. 584, 586 (1941). When the United States consents to suit for a class of cases, the terms of its consent circumscribe the court's jurisdiction to entertain a particular suit. Id. at 586-87. Congress created such a limited waiver of sovereign immunity in enacting the FTCA. See 28 U.S.C. §§ 2671-2680. Under the FTCA, the United States consents to suit for injuries caused by the negligent acts or omissions of government employees acting within the scope of their official employment. 28 U.S.C. § 2674; Gould v. U.S. Dep't of Health & Human Servs., 905 F.2d 738, 741 (4th Cir. 1990) (en banc). Congress further prescribed a statute of

limitations that operates as a jurisdictional prerequisite to suit under the FTCA, 28 U.S.C. § 2401(b). Gould, 905 F.2d at 741. According to § 2401(b), "[a] tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues . . . ."

In United States v. Kubrick, 444 U.S. 111, 123-24 (1979), the Supreme Court first articulated the standard for determining when a claim "accrues" for the purposes of the FTCA in the, 57 F.3d 362, 364-65 (4th Cir. 1995). context of injuries caused by medical malpractice, holding that such a claim "accrues" when a claimant knows of both the existence of the injury and the cause of the injury. Actual knowledge of negligent treatment is not necessary in order to trigger the running of the statute of limitations; rather, once the claimant is "in possession of the critical facts that he has been hurt and who has inflicted the injury," the claimant has a duty to make diligent inquiry into whether the injury resulted from a negligent act. Id. at 122; accord Gould, 905 F.2d at 743. According to this Court, "[t]he clear import of Kubrick is that a claim accrues within the meaning of § 2401(b) when the plaintiff knows or, in the exercise of due diligence, should have known both the existence and the cause of his injury." Gould, 905 F.2d at 742. Even if a claimant seeks the advice of other medical providers and is incorrectly advised that he did not receive negligent treatment, such advice will not prevent the accrual of the claim. Kubrick, 444 U.S. at 124. Furthermore, a claim will accrue even if the claimant does not know the precise medical reason for the injury, provided that he knows or should know that some aspect of the

medical treatment caused the injury. See Kerstetter v. United States

In deciding whether such claims are timely filed, we must keep in mind that § 2401(b) represents "the balance struck by Congress in the context of tort claims against the Government; and we are not free to construe it so as to defeat its obvious purpose, which is to encourage the prompt presentation of claims." Kubrick, 444 U.S. at 117. While a strict interpretation of § 2401(b) "often works a substantial hardship on plaintiffs and may have a harsh impact on a party innocent of any impropriety," such an interpretation is necessary to avoid "rewriting the FTCA to allow broad, open-ended exceptions." Gould, 905 F.2d at 747.

Based on the precedent of the Supreme Court and this Circuit, it is clear that Hahn's claim accrued in June 2001, at the time that Hahn began consulting with other doctors upon his discharge from the hospital. Hahn first contends that he had no knowledge of the existence of his injury at the time of discharge because his condition had appreciably improved as a result of the medical treatment. While it is true that some medical treatments might not produce a complete recovery even if non-negligently administered, Hahn admits that he consulted with other doctors because he was dissatisfied with his rehabilitation and wanted to see if other doctors could effect a more complete recovery. Given Hahn's dissatisfaction with his level of recovery at the time of discharge, together with his subsequent consultations with other doctors, he was put on notice of the existence of an injury.

Hahn next contends that even if he had knowledge of the existence of an injury, he had no knowledge that the injury was caused by BNNMC's failure to administer the initial IVIg treatment for five days. In support of this contention, Hahn points to the fact that he consulted with several doctors regarding his rehabilitation and that none of the doctors specifically informed him that his residual weakness was caused by the incomplete IVIg treatment. Hahn's argument is flawed because it assumes that a claimant cannot be charged with knowing the cause of an injury until the claimant has been actually informed of its specific cause. However, the relevant inquiry is not whether the plaintiff actually knows of the cause of the injury, but whether he "knows or, in the exercise of due diligence, should have known . . . [of] the cause of his injury." Gould, 905 F.2d at 742.

Hahn consulted with several doctors beginning in June 2001, and those doctors directly asked him whether he had been given any subsequent IVIg treatments or a plasma exchange following the initial IVIg treatment. When Hahn responded in the negative, the doctors' consistent, nonplussed reactions should have put him on notice that his medical treatment might have been the cause of his residual weakness. A reasonable person exercising due diligence under the same circumstances would have provided the doctors with his medical records and asked the doctors whether some aspect of his treatment might have caused his incomplete recovery. Hahn admits that he did not inquire further or provide any of the doctors with his medical records until his meeting with Dr. Meythaler in August 2003. In fact, Hahn's

consultation with Dr. Meythaler demonstrates that had Hahn exercised the same due diligence when he first began consulting with other doctors, he would have been able to ascertain the precise medical reason for his injury and file his claim well within the two-year statute of limitations.

If this Court were to adopt Hahn's interpretation of the Kubrick standard, it would effectively eliminate the requirement that a claimant exercise due diligence in ascertaining the existence of an injury and its likely cause. See Gould, 905 F.2d at 742; Kerstetter, 57 F.3d at 364. Such an interpretation is directly contrary to our precedent and at odds with the public policy concerns of timely claim presentation that underlie § 2401(b). We do not hold that a person is automatically put on inquiry notice merely from the fact that he received medical treatment and did not make a complete recovery. We only conclude that, under these particular circumstances, Hahn was put on notice of an injury and would have discovered the likely cause of this injury had he exercised due diligence.

Since Hahn's claim accrued in June 2001 for purposes of the FTCA, his filing of the administrative complaint on February 26, 2004 was outside of the two-year statute of limitations provided by § 2401(b). Since § 2401(b) is a jurisdictional prerequisite to suit under the FTCA, the district court lacked subject matter jurisdiction to hear the suit.

III.

For the foregoing reasons, we affirm the judgment of the district court.

AFFIRMED

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

BERTRAM HAHN	*
	*
Plaintiff	*
	*
v.	*
	*
UNITED STATES OF AMERICA,	*
	*
Defendant	*

Civil No. PJM 06-3179

Entered: March 23, 2007

ORDER

The Court held a hearing and ruled on the United States' Motion to Dismiss [Paper No. 14]. Accordingly it is, this 23rd day of March, 2007, for the reasons stated on the record,

ORDERED:

1) The United States' Motion to Dismiss [Paper No. 14] is GRANTED; and

2) The Clerk SHALL CLOSE this case.

/s/
PETER J. MESSITTE
UNITED STATES DISTRICT JUDGE